Kay Synergy Sdn Bhd v Malayan Banking Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–76 OF 2005
VT SINGHAM J
27 JUNE 2007

Civil Procedure — Appeal — Adducing fresh evidence — Application for leave to produce further evidence — Application made after trial at sessions court to include a supplementary record of appeal to introduce further evidence at appeal stage — Whether able to satisfy threshold test — Rules of High Court 1980 O 3 r 5, O 92 r 4

Evidence — Fresh or further evidence — Admission of, on appeal — Application for leave to produce further evidence — Whether fresh evidence within their knowledge and obtainable with reasonable diligence

The plaintiff/appellant purchased properties at a public auction held on 28 October 1995. Subsequently, the plaintiff registered the Form 16F and had the said properties registered into their name. However, on 29 September 1997 as registered owners of the said properties, the plaintiff received a letter from the Kinta Land and District Office, Batu Gajah requesting to pay the arrears of quit rent of RM120,557.70 from 1982–1984 for the said properties. The plaintiff filed a claim against the defendant for arrears of quit rent. The plaintiff alleged that the defendant had failed, refused and neglected to pay the said quit rent for the land pursuant to the terms of the sale. In order to avoid penalty, the plaintiff alleged that they had advanced the payment on behalf of the defendant. Therefore, the plaintiff claimed in the session court the total sum of RM 248,526.50 and interest with costs. The defendant denied the plaintiff's claim and pleaded that pursuant to the conditions of the sale by the high court Ipoh, all arrears of quit rent shall be paid from the proceeds of the sale of the properties and the defendant was not personally liable and the defendant had settled all arrears of quit rent from the proceeds of the sale as claimed by the Land and District Office Batu Gajah as at November 1995. The plaintiff's suit in the sessions court was based on the conditions of sale and the trial was conducted on the terms of the sale and not on the terms of the charge documents. The appellant applied under O 92 r 4 and O 3 r 5 of the Rules of High Court 1980 for leave to produce further evidence, being charges presentation No 6469/82 and 1104/83 to be included in the record of appeal before the appeal is set and that the plaintiff be granted extension of time to file the supplementary record of appeal.

Held, dismissing the application with costs:

(1) The court found that the plaintiff's claim and the cause of action against the defendant was based on the terms of the condition of sale and this had been

expressly pleaded in the statement of claim. There was no mention of the charge or the terms of the charge. There was not a shred of evidence in the record of appeal or pleadings of the charge documents dated 15 April 1982 at the time of the trial which was presently being sought to be introduced at the appeal stage (see para 10).

(2) The court found that this was not a case where the plaintiff was taken by surprise or that he was not aware of the existence of the charge documents at the time of the trial. This was a clear case where the plaintiff or their legal advisors opted not to plead or include or adduce evidence at the trial of the existence of the charge documents or to refer to the terms of the charge documents which obviously was within their knowledge and obtainable with reasonable diligence for use at the trial. The plaintiff's case at the sessions court was tried on the pleaded statement of claim and if a party wishes the court to try the case on an issue, he must plead the fact or at least ought to have applied to amend the pleadings and this is part of the adversarial system in this jurisdiction as the court cannot volunteer or prompt during the trial what ought to be done or ought to have been done by the party. There was also no satisfactory reason or grounds which had been advanced as to why the plaintiff did not plead the charge documents or relied on the same at the trial except to shift the blame on the defendant and to accuse the defendant that they ought to have produced the charge documents at the trial thereby reversing the onus of proof on the defendant (see para 15).

(3) This was also not a case of procedural technicalities strewn in its path but a clear case of not pleading the plaintiff's case where the material sought to be introduced presently at this appeal was available during the trial. One thing must be made clear that this application to introduce further evidence at the appeal stage was not based upon a ground of procedural breach or on technicalities at the trial but is based upon substantive evidence as claimed by the plaintiff which had been obviously omitted to be presented at the trial for which the plaintiff must accept the fate. All the cases reported on procedural technicalities to oppose had to be distinguished when compared to the factual matrix in the instant case. The exercise of discretion whether to grant or not, however should not be overstretched and to a ridiculous edge of opportunity just to suit the wishes of one party (see para 46).

(4) The plaintiff had failed to satisfy the first requirement of the threshold test being that the further evidence was not available to the plaintiff at the trial who now intends to use it or that reasonable diligence would not have made it so available or obtainable. As to the second contention that the further evidence would have had or would have been likely to have had a determining influence upon the decision of the trial court was also without any basis as cll 12 and 24 which the plaintiff relied upon to persuade the court to introduce the further evidence at this stage expressly stated that it was the obligation of the chargor to pay the quit rent and not the chargee. Therefore, the plaintiff had also failed to satisfy the second requirement of the threshold test. The discretion to allow to introduce further evidence could only be properly invoked where it was demonstrated that the integrity of the earlier litigation process at the trial has

been undermined. It was therefore not sufficient to show merely that the earlier process at the sessions court produced a wrong decision (see paras 56–57).

[Bahasa Malaysia summary

Plaintif/perayu telah membeli hartanah-hartanah di satu lelongan awam pada 28 Oktober 1995. Selepas dari itu, plaintif telah mendaftarkan Borang 16F dan hartanah-hartanah tersebut didaftarkan kepada nama mereka. Akan tetapi pada 29 September 1997 sebagai pemilik berdaftar hartanah-hartanah tersebut, plaintif telah menerima satu surat daripada Pejabat Tanah dan Daerah Kinta, Batu Gajah meminta bayaran tunggakan cukai tahunan sebanyak RM120,557.70 dari 1982–1984 untuk hartanah-hartanah tersebut. Plaintif telah memfailkan satu tuntutan terhadap defendan untuk tunggakan cukai pintu tersebut. Plaintif mendakwa bahawa defendan telah gagal, enggan dan cuai dalam membayar cukai tahunan untuk hartanah tersebut mengikut terma-terma jualan. Untuk mengelakkan penalti, plaintif mendakwa bahawa mereka telah mendahulukan bayaran tersebut bagi pihak defendan. Dengan itu plaintif menuntut di mahkamah sesyen jumlah keseluruhan sebanyak RM248,526.50 dengan faedah dan kos. Defendan menafikan tuntutan plaintif dan memplidkan bahawa mengikut syarat-syarat jualan di mahkamah tinggi Ipoh, segala tunggakan cukai pintu akan dibayar daripada hasil jualan hartanah-hartanah tersebut dan defendan tidak bertanggungjawab secara peribadi dan defendan telahpun menyelesaikan segala tunggakan cukai pintu daripada hasil jualan seperti yang dinyatakan oleh Pejabat Tanah dan Daerah Kinta setakat November 1995. Tindakan plaintif di mahkamah sesyen berdasarkan syarat-syarat jualan dan perbicaraan tersebut dijalankan atas terma-terma jualan dan bukannya terma-terma di dokumen gadaian tersebut. Perayu memohon di bawah A 92 k 4 dan A 3 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk kebenaran mengemukakan keterangan tambahan, iaitu gadaian serahan No 6469/82 dan 1104/83 untuk dimasukkan ke dalam rekod rayuan sebelum rayuan ditetapkan dan plaintif diberi lanjutan masa untuk memfailkan rekod rayuan tambahan.

Diputuskan, menolak permohonan tersebut dengan kos:

(1) Mahkamah mendapati bahawa tuntutan plaintif dan kausa tindakan terhadap defendan adalah berdasarkan terma-terma syarat jualan dan ini telah diplidkan secara khususnya di pernyataan tuntutan. Tiada dinyatakan tentang gadaian tersebut ataupun terma-terma gadaian tersebut. Tiada sebarang keterangan di rekod rayuan ataupun pliding akan dokumen-dokumen gadaian tersebut yang bertarikh 15 April 1982 pada masa perbicaraan yang mana kini dipohon untuk dikemukakan di peringkat rayuan (lihat perenggan 10).

(2) Mahkamah mendapati bahawa ini bukannya satu kes di mana plaintif dikejutkan ataupun ia tidak sedar akan kewujudan dokumen-dokumen gadaian tersebut pada masa perbicaraan. Ini adalah satu kes yang jelas di mana plaintif ataupun peguamcaranya memilih untuk tidak memplidkan atau memasukkan atau mengemukakan keterangan pada perbicaraan akan kewujudan dokumen-dokumen gadaian tersebut ataupun merujuk kepada terma-terma dokumen-dokumen gadaian tersebut yang tentunya dalam

pengetahuan mereka dan dapat diperoleh melalui ketekunan yang munasabah untuk digunakan di perbicaraan. Kes plaintif di mahkamah sesyen telah dibicarakan atas pernyataan tuntutan seperti yang diplidkan dan sekiranya satu pihak ingin mahkamah untuk membicarakan satu isu, beliau harus memplidkan fakta atau sekurang-kurangnya memohon untuk meminda pliding-pliding dan ini adalah sebahagian daripada sistem adversarial di dalam bidang kuasa ini oleh kerana mahkamah tidak boleh secara sukarela atau mendesak ketika perbicaraan apa yang harus dilakukan ataupun sepatutnya dilakukan oleh pihak. Tidak juga terdapat alasan yang memuaskan atau alasan-alasan yang dikemukakan atas sebab mengapa plaintif tidak memplidkan dokumen-dokumen gadaian ataupun bergantung padanya semasa perbicaraan tetapi hanya mengalihkan kesalahan ke atas defendan dan mendakwa bahawa defendan seharusnya mengemukakan dokumen-dokumen gadaian tersebut pada perbicaraan dan dengan itu mengakas beban bukti kepada defendan (lihat perenggan 15).

(3) Ini juga bukannya satu kes berdasarkan prosedur teknikal tetapi satu kes yang jelas di mana plaintif tidak memplidkan perkara-perkara yang dapat diperoleh ketika perbicaraan, yang kini dipohon untuk dikemukakan di rayuan ini. Satu perkara yang patut dijelaskan di permohonan ini untuk mengemukakan keterangan yang lanjut di peringkat rayuan ini bukannya berdasarkan perlanggaran prosedur ataupun teknikal di perbicaraan tersebut tetapi berdasarkan keterangan substantif seperti yang didakwa oleh plaintif yang telah tertinggal daripada dikemukakan di perbicaraan yang plaintif sepatutnya menerima nasibnya. Segala kes yang dilaporkan atas prosedur teknikal untuk membangkang patut dibezakan apabila di banding dengan fakta matriks kes ini. Pelaksanaan budi bicara sama ada untuk memberi atau tidak, sepatutnya tidak harus melampaui hadnya ke tahap yang tidak munasabah hanya untuk memenuhi hasrat satu pihak (lihat perenggan 46).

(4) Plaintif telah gagal memenuhi keperluan pertama ujian ambang iaitu keterangan lanjut tidak dapat diperoleh oleh plaintif pada peringkat perbicaraan di mana sekarang plaintif ingin menggunakannya ataupun walaupun ketekunan yang munasabah digunakan masih tidak dapat memperolehnya. Berhubungan dengan keperluan kedua bahawa keterangan lanjut akan dapat atau kemungkinan akan mempengaruhi keputusan mahkamah perbicaraan adalah tanpa asas oleh kerana Klausa-klausa 12 dan 24 yang plaintif bergantung kepada untuk meyakinkan mahkamah mengenalkan keterangan lanjut pada peringkat ini secara nyata menyatakan bahawa ia adalah obligasi Penggadai untuk membayar cukai pintu dan bukannya Pemegang Gadaian. Dengan itu, plaintif juga telah gagal memenuhi keperluan kedua ujian ambang tersebut. Budi bicara untuk membenarkan pengenalan keterangan lanjut hanya dapat digunakan dengan wajarnya sekiranya ia dapat ditunjukkan integriti proses litigasi di perbicaraan yang awal tersebut telah dilemahkan. Dengan itu ia tidak mencukupi untuk hanya menunjukkan bahawa perbicaraan terdahulu di mahkamah sesyen menghasilkan satu keputusan yang salah (lihat perenggan 56–57).]

Notes

For cases on adducing fresh evidence, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 637–662.

For cases on admission of fresh or further evidence on appeal, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1535–1549.

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (folld)

Brown v Dean [1910] AC 373 (folld)

Bruce v Odham Press Ltd [1936] 1 KB 697 (refd)

Bevington v Perks [1925] 2 KB 231 (refd)

Chennell Jones, In Re v Chennell [1878] 8 ChD 492 (folld)

Clarapede v Commercial Union Association (1883) 32 WLR 262 (refd)

Commodore Pty Ltd v Perpetual Trustee [1984] 1 NZLR 324 (refd)

Curwen v James [1963] 2 All ER 619 (refd)

David Wong Hon Leong v Norazman bin Adnan [1995] 4 CLJ 155 (refd)

Farrell v Secretary of State for Defence [1980] WLR 172 (refd)

Hadmor Productions v Hamilton [1983] 1 AC 191 (refd)

Haji Mohamed Dom v Sakiman [1956] MLJ 45 (refd)

Hock Hua Bank Bhd v Leong Yu Chin [1987] 1 MLJ 230 (refd)

Hoo Kok Chong v Yong Tim [2004] 1 MLJ 305 (distd)

Hongkong & Shanghai Bank Corp Ltd v Wan Mohd bin Wan Ngah [1991] 3 MLJ 119 (distd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Johnson v Johnson 1901 P 193 (folld)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Sdn Bhd [2004] 1 MLJ 271 (distd)

Ladd v Marshall [1954] All ER 745 (refd)

Lo Fat Thjan & Ors v Public Prosecutor [1968] 1 MLJ 274 (refd)

Maxisegar Sdn Bhd v Silver Concept Sdn Bhd [2005] 5 MLJ 1 (refd)

McCann v Sheppard [1973] 2 All ER 881 (refd)

Murphy v Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949 (refd)

Mulholland v Mitchell [1971] 1 All ER 307 (refd)

Murtagh v Barry (1890) 24 QBD 632 (refd)

Novotel Societe d' Investissements et d' Exploitation Hoteliers and Anor v Pernas Hotel Chain (Selangor) Bhd [1987] 1 MLJ 210 (refd)

Osborne v Bank of USA 9 Weathe 738 (refd)

Ritter v Godfrey [1920] 2 KB 47 (refd)

R Ramachandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Seven Seas Supply Co v Rajoo [1966] 1 MLJ 71 (refd)

Sharp v Wakefield [1891] 1 KB 587 (refd)

Tajul Ariffin v Heng Cheng Hong [1993] 1 AMR 26 (refd)

Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445 (folld)

Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd [1996] 2 MLJ 596 (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (refd)
Young v Kershaw 1889 81 LT 531 (refd)

Legislation referred to

National Land Code ss 256, 268, 301(A), Form 16F
Rules of High Court 1980 O 3 r 5, O 55 r 5A, O 92 r 4
Subordinate Court Rules 1980 O 20 r 8

A Silvanathan (Rachael Shanti with him) (Kean Chye & Sivalingam) for the appellant.
Lee Pooi Mun (Khong & Son) for the respondent.

VT Singham J:

[1] By summons in chamber dated 11 January 2007 (encl 11), the appellant has applied under O 92 r 4 and O 3 r 5 of the Rules of High Court 1980 ('the RHC') as follows: (In this proceedings, the appellant and the respondent would be referred to as the plaintiff and defendant respectively.)

(a) the plaintiff be granted leave to produce further evidence, being charges presentation No 6469/82 and 1104/83 to be included in the record of appeal before the appeal is set.

(b) the plaintiff be granted extension of time to file the supplementary record of appeal.

[2] The grounds raised by the plaintiff is as follows:

(a) Pursuant to an order of the court dated 13 February 1995, the defendant as the charge had carried out a public auction on 28 October 1995 to enforce a charge on properties which was charged to the defendant's bank. The plaintiff purchased the properties at the said auction.

(b) The learned sessions court judge found cut off point on the obligation of the defendant to pay the quit rent and assessment in the sale of the properties. The findings or decision of the learned sessions court judge is against the specific terms of the charge. Therefore, this court ought to consider the terms of the charge and review the decision of the learned sessions court judge.

(c) In the event the charge was introduced at the trial there was a possibility that the decision of the learned sessions court judge or the view on the obligation of the charge to pay the quit rent and other payment would be different.

(d) The introduction of the charge at this stage of the appeal would not prejudice the defendant as the charge is not new evidence and the defendant had full knowledge of the said charge as it was enforced to protect the interest of the defendant.

(e) It is necessary to include the charge in the supplementary Record of Appeal to show the terms of the charge before this court.

[3] FACTS

(1) At the Sessions Court Ipoh, the plaintiff had filed a claim against the defendant for the total sum of RM 248,526.50 which the plaintiff is alleged to have advanced and paid to the Land and District Office, Batu Gajah on behalf of the defendant as arrears of the quit rent over 643 titles for the years 1982–1984.

(2) The plaintiff has alleged that the defendant had failed, refused and neglected to pay the said quit rent for the land *pursuant to the terms of the sale*. In order to avoid penalty, the plaintiff had advanced the payment on behalf of the defendant. Therefore, the plaintiff claims the total sum of RM 248,526.50 and interest with costs.

[4] (i) By the statement of defence, the defendant has denied the plaintiff's claim and any obligation to pay the said quit rent as claimed. The defendant has also pleaded that pursuant to the conditions of the sale by the High Court Ipoh, all arrears of quit rent shall be paid from the proceeds of the sale of the properties and the defendant is not personally liable and the defendant has settled all arrears of quit rent from the proceeds of the sale as claimed by the Land and District Office Batu Gajah as at November 1995.

(ii) Further, the defendant has also pleaded that pursuant to s 301(A) of the National Land Code ('the NLC'), the plaintiff would not be able to register the certificate of sale (Form 16F) which was issued by the court until all the quit rent is settled and the plaintiff has been registered as the owner of the land.

Section 301(A) of the NLC states as follows:

301A. Rents to be paid before presentation

Any instrument which has been entered in the Presentation Book pursuant to section 295 *shall not be registered if any rent due in respect of the land and, where applicable*, any levy payable under sub-s (2) of s 433B *have not been paid at the time of presentation*.

(Emphasis added.)

(iii) Alternatively, the defendant has pleaded that the registration of the Form 16F in favour of the plaintiff as the registered owners has discharged all liabilities of the defendant if there was any in respect of the said land and there is no nexus or contractual relationship between the plaintiff and the defendant. In the event the plaintiff has made any payment to the Land Office which the defendant has no knowledge; it was not paid on behalf of the defendant and has nothing whatsoever to do with the defendant as the defendant has settled all dues to the Land Office as at November 1995.

[5] At this proceeding (encl 11), learned counsel for the plaintiff inter alia submitted as follows:

(a) The plaintiff is the registered owner of the said properties whereas the defendant was at the material time of the existence of the charge, the chargee of the said properties.

(b) The said properties were purchased by the plaintiff at the public auction carried out on 28 October 1995 by the defendant at the purchase price of RM7,101,000.

(c) Pursuant to s 268 of the NLC and the terms and conditions of the charge, the defendant has settled the arrears of the quit rent and assessment as at the date of the auction, ie 28 October 1995 based on the outstanding amount of the quit rent as notified by the Kinta Land and District Office via their letter dated 21 November 1995. Subsequently, the plaintiff registered the Form 16F and had the said properties registered into their name.

(d) However, on 29 September 1997 as registered owners of the said properties, the plaintiff received a letter from the Kinta Land and District Office, Batu Gajah requesting to pay the arrears of quit rent of RM120,557.70 from 1982–1984 for the said properties. Although the defendant was informed of the same, nevertheless the defendant had failed to heed to the plaintiff's request to settle the said arrears of quit rent.

(e) Being the registered owner and to avoid the said properties from being liable to forfeiture, the plaintiff had advanced the payment of the said arrears.

(f) The rights of the defendant to sell the said properties to the plaintiff were derived from the terms and conditions contained in the said charge and also under s 256 of the NLC.

(g) Therefore, in any circumstances, the obligations of the defendant as the chargee of the said properties are as provided for in the terms and conditions of the said charge.

[6] Learned counsel for the plaintiff therefore submitted that the application should be allowed and relied on the following cases namely:

(i) *Hoo Kok Chong v Yong Tim* [2004] 1 MLJ 305;

(ii) *Hongkong & Shanghai Bank v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 155;

(iii) Commentary by Judith Sihombing; Chapter 12 of the National Land Code;

(iv) *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Sdn Bhd* [2004] 1 MLJ 271;

(v) *R Ramachandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[7] On the other hand, learned counsel for the defendant submitted as follows:

(a) The defendant does not propose to file an affidavit in reply. However, the application to introduce further evidence at this appeal stage was opposed on two grounds:

(i) The charge documents were not pleaded in the statement of claim.

(ii) The criteria to introduce fresh evidence as laid in *Ladd v Marshall* have not been satisfied.

(b) The plaintiff's suit in the sessions court was based on the conditions of sale and the trial was conducted on the terms of the sale and not on the terms of the

charge documents. The terms of the charge documents were not even put to any of the witnesses during the trial to show that it was a relevant document.

(c) The charge documents, if it is allowed to be introduced at this appeal stage now will be highly prejudicial to the defendant. The charge documents cannot be relevant as the plaintiff's case was based on the terms and conditions of the sale.

(d) By now applying the charge documents to be introduced at the appeal stage, the plaintiff is completely moving to an entirely new and another set of documents.

(e) The relevancy of the charge documents were not pleaded in the statement of claim as to how the charge came about for the same to be relevant and referred to two cases:

(i) *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1;

(ii) *Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd* [1996] 2 MLJ 596;

(f) The learned sessions court judge did not have the opportunity to decide on the documents proposed to be included in the record of appeal. Although the charge documents were in the possession of the defendants, there was still various options available to the plaintiff to obtain the documents but did not exercise it and referred to O 20 r 8 of the Subordinate Court Rules 1980.

(g) O 20 r 8 of the SCR 1980 states as follows:

Inspection of documents referred to in pleading and affidavits.

(1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 50 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.

(2) The party on whom a notice is served under paragraph (1) must, within four days after service of the notice, serve on the party giving the notice a notice in Form 51 stating a time within seven days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

(h) The charge documents were never referred to at the trial nor any part of the charge documents were ever referred to or put to the witness. This application is actually an attempt to introduce fresh evidence

(i) The criteria as laid down in *Ladd v Marshall* [1954] All ER 745 are also applicable in the instant case which is sought to introduce further evidence. The same principle applicable to introduce fresh evidence should also be applied in the instant case to introduce further evidence at the appeal stage.

(j) The charge documents were available during the trial but the plaintiff did not adduce evidence of the same. It would be speculating whether the

charge documents would have influenced the decision of the learned sessions court judge to arrive at a different finding.

(k) The two criteria as set out in the case of *Ladd v Marshall* have not been satisfied. The two principles must be read conjunctively and both conditions must be satisfied.

[8] In reply, learned counsel for the plaintiff submitted as follows:

(a) The party who is alleging prejudice has to reply as to what is the prejudice by an affidavit in reply.

(b) If there is injustice, the court can ask for further information to correct this injustice. The criteria as stipulated in O 55 r 5A of the RHC are different from the principle as laid down in *Ladd v Marshall*.

(c) The charge documents were not in the possession of the plaintiff at the trial and O 55 r 5 A of the RHC would not apply.

(d) In the interests of justice, the application should be allowed.

(e) The charge documents have various clauses and it is for the court to interpret and not the witness and referred to s 268 of the NLC and contended that it is the obligation of the chargee to pay the arrears of quit rent. Section 268 of the NLC states as follows:

S 268. Application of purchase money.

(1) The purchase money arising on any sale under this Chapter shall be applied as follows —

(a) firstly, in the payment of rent to the State Authority or the lessor (according as the charge was a charge of land or of a lease) and, so far as no person other than the chargor was responsible therefore, any other outgoings payable to the State Authority or any local authority;

(b) secondly, in the payment of the expenses (as certified by the Registrar of the Court or Land Administrator, as the case may be) incurred in connection with the making and carrying into effect, of the order for sale;

(c) thirdly, in the payment to the chargee of the total amount due under the charge at the time of the sale;

(d) fourthly, in the case of a charge to secure the payment of an annuity or other periodic sum, in accordance with any provision for the satisfaction of payments subsequently falling due included therein pursuant to paragraph (b) of sub-section (2) of section 242; and

(e) fifthly, in the payment off of subsequent charges, if any, in the order of their priority

(2) The reference in paragraph (e) of sub-section (1) to the payment off of subsequent charges is a reference-

(a) in the case of a charge to secure the re-payment of a debt, or the payment of any sum other than a debt, to the payment to the chargee of the principal sum thereby secured (or so much thereof as is then outstanding) together with any interest then due, if any;

A (b) in the case of a charge to secure the payment of an annuity or other periodic sum, to the payment to the chargee of all sums then due, and the giving effect to any provision for the satisfaction of payments subsequently falling due included therein as mentioned in paragraph (d) of sub-section (1).

(3) The residue, if any, of the purchase money shall, subject to sub-section (3) of section 339, be paid to the chargor.

B

[9] Learned counsel for the defendant further submitted that:

(a) Even if the court were to disregard the statement as submitted by the counsel from the Bar as there is no affidavit in reply, the court can still consider the position of the law as the charge documents were not pleaded in the statement of claim or raised or put to the witnesses during the trial. Learned counsel for the defendant also had referred to the notes of evidence which is included in the record of appeal which was agreed by both parties to be referred at this application.

C

D

DECISION

[10] In the instant case, this court finds that the plaintiff's claim and the cause of action against the defendant is based on the terms of the condition of sale and this has been expressly pleaded in the statement of claim dated 14 September 2001. There was no mention of the charge or the terms of the charge. At the request of both parties, this court perused the record of appeal particularly, the statement of claim and defence and the notes of evidence adduced at the trial and found that there was not a shred of evidence or pleadings of the charge documents dated 15 April 1982 at the time of the trial which is presently being sought to be introduced at the appeal stage. In *Hock Hua Bank Bhd v Leong Yu Chin* (1987) 1 MLJ 230; Syed Agil Barakbah J (as he then was) said a 'cause of action':

E

F

> … simply a factual situation, the existence of which entitle the plaintiff to obtain from the court a remedy against the defendant: (See also *Letang v Cooper* [1965] 1 QB 232 at pp 242–243; *Cooke v Gill* (1893) LR & C.P 107 at p 116. *Read v Brown* [1888] 22 QBD 128 at p 131; *Lim Kean v Choo Koon* [1971] 1 MLJ 158).

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[11] However, it is important to be reminded that the factual situation in each case may differ from one case to another and is to be determined on a case to case basis. As stated above, in the instant case, the plaintiff's claim is based on the terms of the condition of sale in respect of the auction and there was no mention of the charge documents or the terms of the charge documents which was dated 15 April 1982. The particulars which were pleaded in the statement of claim, being the cause of action, is as follows:

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1. On or about the 28. October 1995, the defendant by order of court dated 13 February 1995 pursuant to Originating Summons No 24–689–1994 by its servants, agents or otherwise conducted a public auction by way of Proclamation of Sale for the sale of pieces of land, particulars whereof are set out herein, all in the Mukim of Sungai Raia, District of Kinta, State of Perak (hereinafter called 'the said land'). Form 16F pursuant to s 259 of the National Land Code was duly issued.

2. The plaintiff at the auction tendered for and purchased the said lands for a sum of RM7,101,000 and the plaintiff executed an agreement on the 28 October 1995. The proceeds were made in favour of the defendants as follows:

DATE OF PAYMENT	RM
26.10.95	710,100
23.1.96	690,900
23.1.96	5,700,000
	7,101,000.00

3. It was a term and condition of the sale that the arrears of quit rent and assessment shall be paid for from the proceeds of the sale *pursuant to para 12 of the conditions of sale.*

4. The defendant has only settled quit rent and arrears only in respect of the following 155 out of 777 titles.

5. The defendant has failed, refused and neglected to pay quit rent to pejabat Daerah & Tanah Kinta, Batu Gajah in respect of the remaining lands in *accordance with the condition of sale* and in order to avoid further penalties, the plaintiff has advanced on behalf of the defendant to the pejabat Daerah & Tanah Kinta, Batu Gajah, the following sum of money:

   (a) sum of RM115,966.10 being quit rent and penalties for 421 titles paid on 17.11.98 for the years from 1982 to 1984, in particulars whereof are set in the First Schedule hereunder;

   (b) a sum of RM132,138.50 being quit rent and penalties for 201 titles paid on 25.1.00 for the years from 1982 to 1984, in particulars whereof are set in the Second Schedule hereunder;

   (c) a sum of RM421.90 being additional quit rent for 1 title paid on 20.6.01 for the years from 1982 to 1984, in particulars whereof are set in the third Schedule hereunder

6. In spite of the repeated demands made, the defendant has willfully refused, failed and neglected to settle to the plaintiff the said sums advanced on its behalf or at all.

7. Whereof the plaintiff claims:

   (a) The sum of RM115,966.10 advanced to the Pejabat Daerah & Tanah Kinta, Batu Gajah by the plaintiff on behalf of the defendant as arrears of quit rent from 1982 to 1984 for the following 421 tittles as per First Schedule annexed hereto;

   (b) The sum of RM132,138.50 advanced to the Pejabat Daerah & Tanah Kinta, Batu Gajah by the plaintiff on behalf of the defendant as arrears of quit rent from 1982 to 1984 for the following 201tittles as per Second Schedule annexed hereto;

(c) The sum of RM421.90 advanced to the Pejabat Daerah & Tanah Kinta, Batu Gajah by the plaintiff on behalf of the defendant as arrears of additional quit rent from 1982 to 1984 for the following 1 title as per Third Schedule annexed hereto;

(d) Interest at 8% per annum;

(a) on the sum of RM115,966.10 from 11 November 1998;

(b) on the sum of RM132,138.50 from 26 January 200;

(c) on the sum of RM421.80 from 21 June 2001;

(e) interest at the rate of 8% per annum from date of judgment to date of satisfaction;

(f) such further order or other relief as the honorable court deems fit and proper;

(g) costs.

[12] The contention of learned counsel for the plaintiff that the charge documents were not in the possession of the plaintiff at the trial and that O 55 r 5A of the RHC would not apply to adduce further evidence as the evidence was not available to the plaintiff is not a correct proposition in law as the second limb of r 5A(a) and (b) would still apply. O 55 r 5A of the RHC states:

At the hearing of the appeal fresh evidence shall not be admitted unless the judge is satisfied that:

(a) at the hearing before the subordinate court *the new evidence was not available to the party seeking to use it,* or *that reasonable diligence would not have made it so available;* and.

(b) the fresh evidence; if true, would have had or would have been likely to have had a determining influence upon the decision of the subordinate court.

(Emphasis added.)

[13] In fact, the second limb of r 5A(a) expressly refers to 'reasonable diligence' that would not have made the new evidence available. Therefore, and even if this court were to go along with the submissions of learned counsel for the plaintiff, that the evidence which is sought to be introduced as further evidence and that the charge documents were in the possession of the defendant, this court finds that reasonable diligence and proper procedural steps if were taken on behalf of the plaintiff, would have without any reasonable doubt made it so available to the plaintiff at the trial.

[14] As to the contention that it is the obligation of the chargee-bank under s 268(1) of the NLC to pay the arrears of quit rent for the years 1982–1984, it is also not a correct proposition in law. Section 268(1) of the NLC states that the purchase money arising on any sale shall be applied first in the payment to the state authority so far as no person other than the chargor was responsible. In any event, this court must not and will not proceed any further into the merits as to who is liable to settle the amount as advanced and paid by the plaintiff as that would be a matter to be decided at the hearing of the appeal. There seems to be also a discrepancy on the

amount claimed by the letters dated 26 September 1997 from the Pejabat Daerah dan Tanah Kinta (exh CWL-4) and the letter dated 22 October 1997 from the plaintiff to the defendant (exh CWL-5) attached to the affidavit in support of this application (encl 12) when compared to the amount and particulars as pleaded in the statement of claim which could be dealt with at the hearing of the appeal.

[15] This court finds that this is not a case where the plaintiff was taken by surprise or that he was not aware of the existence of the charge documents at the time of the trial. This is a clear case where the plaintiff or their legal advisors opted not to plead or include or adduce evidence at the trial of the existence of the charge documents or to refer to the terms of the charge documents which obviously was within their knowledge and obtainable with reasonable diligence for use at the trial. It is important to stress that the plaintiff's case at the sessions court was tried on the pleaded statement of claim and if a party wishes the court to try the case on a issue, he must plead the fact or at least ought to have applied to amend the pleadings and this is part of the adversarial system in this jurisdiction as the court cannot volunteer or prompt during the trial what ought to be done or ought to have been done by the party. The plaintiff had the opportunity and the assistance of a lawyer to introduce the charge documents at the trial by various methods as provided by the rules of the court in order to meet their case but they had failed or neglected to do so. There is also no satisfactory reason or grounds which had been advanced as to why the plaintiff did not plead the charge documents or relied on the same at the trial except to shift the blame on the defendant and to accuse the defendant that they ought to have produced the charge documents at the trial thereby reversing the onus of proof on the defendant.

[16] This is also not a case where the plaintiff's application to amend the pleadings or to call for further evidence after the close of the plaintiff's case or the defendant's case had been rejected by the trial court (see *In Re Chennell Jones v Chennell* (1878) 8 ChD 492 and *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445). This is a clear case of an attempt made by a party who has lost his case by producing a new set of evidence where the decision which was given was based on the pleadings and the evidence adduced at the trial.

[17] The principle applicable to receive further evidence at the appeal and fresh evidence has been explained and distinguished in In *Re Chennell Jones v Chennell* 1878 8 ChD 492 and *Johnson v Johnson* 1901 P 193. In fact, his Lordship Gopal Sri Ram JCA in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445 has clearly explained the circumstances when fresh evidence for use at the trial is sought to be introduced and the jurisdiction of an appellate court to receive further evidence at the appeal.

[18] In *Re Chennell Jones v Chennell* 1878 8 ChD 492, fresh evidence has been defined at pp 505–506 as:

> … what is the meaning of the words 'further evidence'? in my opinion they mean evidence not used at the trial or hearing in the Court below. I think that this appears quite obvious if we consider the meaning of the rule. All appeals are by way of rehearing, that is by trial over again, on the evidence used in the court below; but there is special power to receive

A further evidence. I must say, at the risk of repetition, that these words appear to me to mean any evidence whatever not used at the trial. If that it is, it can make no difference that the evidence in question has already been used in the same cause, or in any other cause between the same parties, so that it could have been read or used in the court below simply upon giving notice, it still was evidence used before the court below.

B That being so, we come to the next point. This is an appeal from a judgment after trial, a judgment upon further consideration, and a party can only adduce such evidence upon special grounds, and not without special leave. Now, in this case, notice was given that special leave would be asked when the case came on before the court, of course the court might give special leave upon that notice. It is not requisite, though it is sometimes convenient, and it is always expensive, to give a separate notice of motion for leave to have C further evidence heard, and it is generally more convenient that the court should know something about the case before it decides upon such a motion. And, therefore, the course pursued in the first instance is, as a general rule, more convenient, and certainly less expensive than giving a separate notice of motion. I think therefore, that we are entitled to entertain the application upon such a notice.

D The next question is, whether there is here a sufficient special reason. It is impossible to lay down a priori what will be a sufficient special ground. At the same time, my opinion is that the court should be very cautious about admitting further evidence, and it is not by any means to be admitted as a mere matter of course, but there should be a strong reason given for admitting it.

Now, what is the case here? The question is a question of costs depending on the conduct E of the defendant. Evidence as to that conduct had been gone into at chambers, but of course it would not appear upon the certificate. According to the practice of the court, the appellant was not entitled to read this evidence without giving notice to the other side; the object of requiring such notice being to provide in the first place that the other side should be prepared to meet the evidence, and in the next place to provide for costs occasioned by briefing that evidence, since, as a general rule, neither side would be entitled to put into his F brief, on further consideration, the evidence used before the Judge in chambers. That notice was not given, but the appellant endeavored to read the evidence, and tendered it in the court below. It was rejected upon the ground of want of notice. It is disputed whether or not the counsel for the party desiring to use that evidence did or did not ask for an adjournment; but in my opinion the judge below ought to have granted the adjournment as a matter of course, without being asked for it. It is not the administration of justice, but G where he sees that he is prevented from receiving material or available evidence merely by reason of technical objection, he ought to remove the technical objection out of the way, upon proper terms as to costs and otherwise. I have known an objection taken at the trial to the admission of a document which everybody knew to be genuine one, and I have known the Judge say to the person taking the objection, 'I will adjourn the cause, but reserve the costs', and thereupon the objection has been withdrawn. That I have seen more than H once, and I cannot help thinking that if the judge in the court below had offered the adjournment, the other side would have allowed the evidence to be read, It appears to me that a case of this kind, where evidence which had been before the judge in chambers was excluded by this kind of technical objection, affords a special ground why it should be admitted in the Court of Appeal, and for that reason I think it should now be admitted.

I **[19]** In *In Re Chennell Jones v Chennell*, the plaintiff had in fact applied to introduce the fresh evidence at the proceeding at the court below but it was not allowed and neither was adjournment granted. Therefore, on appeal, it was held inter alia that the application to introduce further evidence at the trial ought not to have been refused by reason of technical objections and instead ought to have granted an

adjournment upon proper terms as to costs and otherwise. However, in the instant case, the situation and circumstances are not the same as can be derived from the facts highlighted above, whereby the plaintiff had the knowledge of the existence of the charge documents and had the opportunity to produce the same for use at the trial if only reasonable diligence and effort had been made but the plaintiff had failed or neglected to do so.

[20] On the other hand, the definition of fresh evidence has been defined in *Johnson v Johnson* 1901 P 193 where The President (Sir FH Jeune) said:

> The question raised in this case is of general interest, but, to my mind, absolutely free from doubt.
>
> But it is necessary that magistrates should clearly understand what 'fresh evidence' means, though, in my view, there is no real doubt about it. It means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted: it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial, and which could not by reasonable means have come to his knowledge before that time. It must amount to what was called in the old forms of pleading *res noviter ad notitiam perventa*. It is altogether a mistake to suppose that 'fresh evidence,' within the meaning of the Act of 1895, means or includes evidence which could have been called, but which was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence, and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance. I have no hesitation in saying that to the words 'fresh evidence' in s 7 must be assigned the limited meaning and scope which I have indicated. Applying that definition to the present case, the magistrates were mistaken in accepting the evidence at the second hearing, as they did, simply because it was evidence which had not been given before. They were misinformed or misadvised by their clerk as to the definition of the words 'fresh evidence.' I think, however, by the light of the doctor's affidavit now before us, that the evidence, or the greater part of the evidence, brought forward at the second hearing was 'fresh evidence' within the meaning of the Act; because the doctor proves not only that the respondent was not able to give evidence, which, from what we have heard, must have been obvious to anybody then present in court, but also that he was in such a condition as not to be able to instruct his solicitor or to tell him the names of two or three witnesses who were afterwards discovered and who, when called at the second hearing, gave evidence of a material kind on his behalf. The magistrates were right in receiving that evidence at the second hearing, but wrong in their reason for receiving it. Now comes the question, What are we to do? There has been, to my mind, a miscarriage of justice, perhaps through a mistake on both sides. There ought to have been an adjournment of the first hearing. That was not asked for, we are told, because the doctor and solicitor of the respondent thought their client and patient was dying. But it exposes the other side to great hardship if, an adjournment having been offered and refused, the evidence of the respondent is sought to be put forward on a subsequent occasion. A similar remark applies to what seems to have happened on the second occasion when the case was before the magistrates. The fresh evidence was tendered, but the wife's solicitor did not ask for an adjournment, on the ground, which he was right about, that the magistrates had no jurisdiction to hear that summons simply because the evidence then given had not been tendered before. He cannot be blamed for the position he took up, inasmuch as it was put forward against him, as a matter of right, that the other side could call any evidence not adduced at the hearing of the first summons. He was justified in standing on his rights. But, in the result, we are landed in what is very like a miscarriage of justice: one bench hears only one side and decides in one way; another bench subsequently

hears only the other side and decides the other way. I am, under these circumstances, quite unable to say with any certainty which decision was right; and I do not see how justice can be done except by sending the case back to the magistrates to be reheard in its entirety, and to be decided by them upon the complete facts. The respondent must pay the costs thrown away below and the costs of this appeal.

In the same case, Gorell Barnes J at p 22 said:

> In my opinion those words only relate to such 'fresh evidence' as, according to well-known rules, would be admitted as ground for a new trial in an ordinary case, or to the discovery of fresh facts or circumstances which have arisen since the hearing, and which may be not unlikely to be met with in this class of cases: such, for example, as material alteration in means, adultery on the part of a former complainant, and so on. Confined in that way, this Act should be interpreted and understood. The magistrates who heard this case were clearly wrong in the way they read the particular section in question on the advice of their clerk. They seem to have acted upon the view that, because certain witnesses were not called at the hearing of the first summons, they were entitled to accept and consider the testimony of those witnesses as 'fresh evidence' within the meaning of s 7. The respondent's solicitor, owing to the state of his client's health, which was known to both sides and to the magistrates at the time of the hearing of the first summons, was not able to adduce evidence which his client and material witnesses on his behalf could have given. That, when brought forward on the second summons, constituted 'fresh evidence' owing to the peculiar circumstances of this case. The only way for us to do justice in this instance is to send the case down for rehearing de novo. The husband must pay the costs, including the costs of this motion. (See *Timmins v Timmins* 1919 p 75 at p 80; *Underwood v Underwood* 1946 p 84 at pp 86–87; *R v Medical Appeal Tribunal* [1959] 3 All ER 40 at pp 46–49).

[21] In *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1, at the hearing of the appeal proper, the appellant sought leave to admit the respondent's director's report and audited account for the year of 1997 and 1998 extracted from the Registry of the Companies as further evidence. The Court of Appeal had on 24 February 2004 dismissed the appellant's appeal with costs and also the motion to adduce fresh evidence which was not before the trial court. In dismissing the appellant's notice of motion to adduce fresh evidence at the hearing of this appeal, Abdul Kadir JCA (as he then was) delivering the judgment of the court said:

> The power of this court to grant leave to admit fresh evidence at the hearing of the appeal is governed by s 69(3) of the Courts of Judicature Act 1964 and r 7(3A) of the Rules of the Court of Appeal 1994. 'The special grounds only' referred to in s 69(3) of the Courts of Judicature Act and the tests set out in r 7(3A) of the Rules of the Court of Appeal 1994 are generally known as the *Ladd v Marshall* conditions. It is settled by various decided cases that the three conditions are cumulative and conjunctive in effect and are not disjunctive in that all the conditions must be fulfilled before such leave to admit fresh evidence be granted. The said three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 at p 148 as follows:
>
> It is common ground that applications of this sort are regarded by this court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of *Ladd v Marshall*:
>
> > To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would

probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.

I pause to observe that these conditions are not alternative; they are cumulative.

See also the judgment of Suffian FJ in *Lau Foo Sun v Government of Malaysia* [1970] 1 LNS 56; [1970] 2 MLJ 70 at p 71 and *Chai Yen v Bank of America National Trust & Savings Association* [1980] 2 MLJ 142 at p 143.

In the present case before us, we found that the appellant's supporting affidavits did not explain fully why the evidence could not have been made available in the court below and why it could not by the exercise of reasonable diligence have been obtained for use at the trial there. This requirement is clearly stated in the *English Supreme Court Practice 1997*, vol 1 at p 1004 as follows:

59/10/14 Mode of application for leave to adduce further evidence …

… The application must be supported by an affidavit deposing to the facts relied upon in support of the application. In particular the affidavit should explain fully why the evidence was not called in the court below, and where the *Ladd v placeCityMarshall* criteria apply, why it could not, by the exercise of reasonable diligence, have been obtained for use at the trial …

We found that the appellant's supporting affidavits did not state these relevant facts in order to fulfill the requirements for the admission of the so-called fresh evidence before us.

The appellant had also failed to satisfy the first test. As admitted by the appellant in para 16 of the affidavit of Gan Ee Chin affirmed on 13 March 2002, the Company Accounts were available as a public document in the Registry of Companies then. The Company Accounts were clearly in the public domain. They were not hidden away by the respondent or for that matter by any other party but for the reason that it was not so made available by the appellant. This evidence could have been made available during the trial if due diligence was taken. If the appellant had conducted a simple search at the Registry of Companies the said Company Accounts could have been easily obtained for use at the trial. This the appellant had failed to do. The various reliefs claimed by the respondent in its pleadings were also plain and clear. In our judgment, the appellant could not have been misled by the respondent's pleadings and claims. It was therefore the duty of the appellant to bring forward its whole case at once in the trial and not to bring them forward as and when it thought appropriate to do so. To a question from the court, counsel for the appellant admitted that they had missed it at the trial.

In our judgment, had the appellant exercised reasonable diligence the fresh evidence now sought to be adduced at the hearing of this appeal could have been obtained during the trial of this action in the court below. We therefore found that there was no merit in the appellant's application before us to adduce the fresh evidence and we had accordingly dismissed the application with costs.

[22] In *Hoo Kok Chong & Anor v Yong Tim* [2004] 1 MLJ 305, the case relied on by learned counsel for the plaintiff, the facts and circumstances are poles apart when compared to the facts in the instant case.

(i) In that case, the deceased who was the grandfather of the plaintiff was the registered owner of the land in question. It was alleged that on 30 December 1966, the deceased executed a trust deed in favour of the plaintiff who were

then minor and held the same in trust for the plaintiff. Under the trust deed, upon the death of the deceased, the land would be transferred to the plaintiff as the beneficiary. However, during his lifetime, he was entitled to sell the land.

(ii) On 26 November 1999, the deceased died. Thereafter the plaintiff's father took over control of the land. It was alleged that the plaintiff's father allowed the defendant to use the land. In 1984, upon attaining the age of majority, the plaintiff approaches the defendant for the return of the land. The defendant refused the plaintiff's request and claimed that he had purchased the land from the deceased in June 1969 for a consideration of RM10,400.00 and that he was the legal owner of the land since 1969. The defendant also claimed that he had applied for and obtained title in continuance of the land in the year 1976. The plaintiff filed a suit for declaration hat the transfer of the land from the deceased to the defendant was null and void and for other consequential orders.

(iii) The plaintiff's action was dismissed with costs. The plaintiff appealed to the Court of Appeal and the appeal was heard on 14 February 2002 but however the hearing date was adjourned to a date to be fixed to enable the plaintiff's solicitor to verify certain facts pertaining to the transfer documents and entries in the land office register. At the trial, the Assistant Land Administrator testified that he had checked all the entries in the presentation book during the year 1969 and found there was no record of any transfer of land during that period as if there was any transfer in July 1969 as claimed by the defendant, the transfer must be registered in the documents of titles book. He had further testified that the titles to the land, which had existed, the original were missing from the registered document of title and that the titles had been removed from the registered document of title. In that case, the defendant claimed that he purchased the land from the plaintiff in June 1969 but there was no Sale and Purchase Agreement between the defendant and the deceased in respect of the purchase and there was no written receipt in respect of the alleged payment of RM10, 400 as the consideration.

(iv) The further evidences sought to be adduced by the plaintiff consist of:

(a) letter dated 6 February 2002 from the Ketua Penolong Pegawai Daerah Selama confirming:

(i) the original titles to the lands have been removed from the registered documents of title (RDT) and loss from the possession of the Land Office.

(ii) The transfer of the land to the defendant was registered on 7 March 1975 at 10.15am as evident from presentation book 1975. An extract of the presentation was attached to the letter

(iii) Form 14A relating to the transfer have also been removed from the RDT of 1975 and loss from the possession of the Land Office.

(iv) A letter dated 11 February 2002 from Pengarah Ukur dan Pemetaan Perak stating that the department could not trace the original title on the first search done on the land 1915. However, an extract of the confirmed plan of the lot in respect of the land and an extract of the gazette notification 19 November 1995 were attached to the letter. This letters revealed the

issued original title of the land were declared loss by the defendant for the purpose of the issuance of the titles in continuation.

(v) In allowing to adduce the further evidence at the appeal stage, the Court of Appeal held that it was manifestly evident that there were real uncertainties in the evidence relating, in particular to the alleged transfer of the land from the deceased to the defendant in June 1969 and the issuance of the titles in continuation to the defendant.

(vi) The Court of Appeal further held that the uncertainties were due not only to the non availability of the pertinent records in the Land Office and the lack of personal knowledge on the part of PW1 about the document tendered in court but also by averment of the defendant in paragraph 4 and 6 of the statement of defence that he bought the land from the deceased in June 1969 which he deposed to the same effect at the trial. The Court of Appeal also held that the averment by the defendant gave the specific time of the purchase being June 1969 and therefore it is only reasonable to expect at the preparatory stage before this trial, the plaintiff or their solicitors had to focused their search in the presentation book at the Land Office only in respect of entries pertaining to all dealings for the year 1969. The Court of Appeal was satisfied that although this new evidence was in existence at the time of the hearing before the High Court, the reasonable diligence would not have made it available to the plaintiff.

(vii) The Court of Appeal held as follows:

> We are of the view that the application to adduce further evidence in this case must be considered in the light of the aforesaid evidence revealed at the trial. It is manifestly evident that there are real uncertainties in the evidence relating, in particular to the alleged transfer of the lands from the deceased to the defendant in June 1969 and the issuance of the title in continuation to the defendant. The uncertainties are due not only to the non-availability of the pertinent records in the land office and the lack of personal knowledge on the part of PW1 about the documents tendered in court but also by the averment of the defendant in paras 4 and 6 of the statement of defence that he bought the lands from the deceased in June 1969 which he deposed to the same effect at the trial. To us, what matters most is that averment of the defendant. The averment gave the specific time of the purchase. That being the case, it is reasonable to expect that, at the preparatory stage before the trial, the plaintiffs or their solicitors had to focus their search in the Presentation Book at the land office only in respect of entries pertaining to all dealings for the year of 1969. To place a burden on them to carry out the search through the entries made in the Presentation Book from 1969 to 1975 would be illogical and unjust because of the tremendous task they had to do for which they did not expect to do or need not do. Of course, if they have had prior knowledge of the transaction of 7 March 1975 they had to carry out that task. That accounts for the need to adduce further evidence as stated in para 3(1)(a)(ii) and (iii) above. Therefore, we are satisfied that although this new evidence was in existence at the time of the hearing before the High Court, reasonable diligence would not have made it available to the plaintiffs. With regard to further evidence as stated in para 3(1)(a)(i) above, this is merely a confirmation of PW1's evidence already adduced at the trial. And the further evidence as stated in para 3(1)(b) above is just a confirmation of what the defendant (DW1) deposed at the trial. Having regard to the uncertainties in the

A evidence as aforesaid and the aforesaid reasons for the uncertainties we are also satisfied that reasonable diligence would not have made this new evidence available to the plaintiffs at the hearing before the High Court. Next, we have to consider whether the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the learned judge. As stated earlier, the defendant claimed that he bought the lands from the B deceased in June 1969 and that he was the legal owner of the lands since then; and PW1, who checked all the entries in the Presentation Book for the whole year of 1969 found no record of such dealing in respect of the lands. However, from the new evidence as stated in para 3(1)(a)(ii) and (iii), it is manifestly evident that the alleged transfer of the lands to the defendant was registered only on 7 March 1975 at 10.15am, nearly some six years later. To our mind, the C extract of the relevant Presentation, being a public document which was produced from proper custody, bears the stamp of truth, that is to say, the alleged transfer was registered on 7 March 1975. Therefore, the claim by the defendant as deposed in evidence that he bought the lands in 1969 and that he became the legal owner of the lands since then could not have been true.

D (viii) On further appeal to the Federal Court, the decision of the Court of Appeal which had admitted the further evidence was upheld (see *Yong Tim v Hoo Kok Chong & Anor* [2005)] 3 CLJ 229).

[23] In so far as the case of *Hongkong & Shanghai Bank Corp Ltd v Wan Mohd bin* E *Wan Ngah* [1991] 3 MLJ 119 relied on by learned counsel of the plaintiff, this court would not go into details of the case at this stage of the proceeding as the decision in that case is based on the merits of that application which in any event was in reference to the chargee's rights and powers to proceed by two separate remedies, one being foreclosure proceeding and the other by civil suit which has no bearing to the facts, circumstances and the law as applied in the instant application.

F

[24] In *Ladd v Marshall* [1954] All ER 745**,** the plaintiff sought to adduce further evidence in the appeal of the defendant's wife who had been called by the plaintiff as a witness at the trial on 12 March 1954 but she was a reluctant witness and stated on oath that she did not remember the plaintiff having paid the money to the G defendant. Judgment was given to the defendant. On 6 May 1954, the defendant's wife obtained a decree nisi of divorce. Subsequently she informed the plaintiff's solicitor that she did remember the occasion on 2 April 1952 and that the money was paid by the plaintiff to the defendant in her presence. The plaintiff appealed and sought to adduce further evidence from the defendant's former wife. In dismissing H the application, Denning LJ (as he then was) said:

> The principles to be applied are the same as those always applied when fresh evidence is sough to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second: the evidence must be I such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third: the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

In the same case, Parker LJ said:

The circumstances in which the court on such application will grant leave to adduce that further evidence must be very rare, for the very good reason that such evidence on the face of it does not comply with the test laid down by Lord Loreburn LC in *Brown v Dean*.

[25] In *Brown v Dean* [1910] AC 373, in an action against the appellant for damages for an assault upon a school girl, who sued by her father as her next friend, evidence was given that the appellant, who was one of the masters in the school, had thumped the girl on her back and pushed her out of the schoolroom, and that she was ill in consequence. The county court judge (who tried the case without a jury) was not satisfied with the evidence of the blow, but found that the appellant pushed the girl with considerable violence out of the room, and gave judgment for her for 12*l* and costs. An application for a new trial was made by the appellant upon affidavit suggesting that the illness of the girl was due to her mother having the day after the assault struck her and accused her of telling lies. It was also alleged that the fresh evidence had only been discovered since the trial and could not have been discovered by the exercise of reasonable diligence before the trial. The application was granted by the county court judge. The order for a new trial was set aside by the Divisional Court (Darling and Jelf JJ) upon the authority of *Murtagh v Barry* (1890) 24 QBD 632 and *Young v Kershaw* 1889 81 LT 531. This decision was affirmed by the Court of Appeal (Lord Alverstone CJ and Farwell LJ; Fletcher Moulton LJ(dissenting). Hence this appeal. Lord Loreburn LC in *Brown v Dean(* 1910) AC 373 at p 374 said:

When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed, would be conclusive.

nothing to shew that the information alleged could not with reasonable diligence have been obtained at the first trial.

But … if he shall think just. Those words do not give him an arbitrary discretion. 'If he shall think just' means if he shall think just according to law".

Anything less satisfactory as an exercise of discretion, or anything more illustrative of the danger of departing from the ordinary rules of administering remedial justice, I can hardly figure."

[26] In *Curwen v James* [1963] 2 All ER 619, the facts were briefly as follows:

In June 1959, the deceased who was a rider of a motorcycle was killed in a motor accident involving a motor car. His widow brought an action for damages under the Fatal Accidents Act 1846 and the Law Reform Act (miscellaneous provision Act 1934). The action was heard in January 1962 when the widow, who had no children, was aged 24. The trial judge who found that the deceased was 1/3 to blame for the accident awarded damages to the widow as future loss of dependency at 6 pound a week and assess the damages at 4,0000 pound without taking into account the possibility of remarriage of the widow and some real diminution in the amount of damages awarded because of that factor. In March 1962, before the expiry of the time for giving notice of appeal she remarried. On appeal by the defendant against the amount of damages, the defendant sought to have the Court of Appeal adduce evidence of the widow's remarriage on the ground that, that if leave was granted, the defendant would contend that, by her remarriage, the widow had not lost the financial support as assessed by the judges.

The Court of Appeal held at p 623:.

> Why should we, when we know that the plaintiff had married, pretend that we do not know it and assess the damages, as we are assessing them anew here, on the footing that she may or may not marry? As we know the truth, we are not bound to believe in a fiction. "

The Court of Appeal admitted the new evidence of the wife's remarriage, the particular circumstances of that case that the event in question occurred soon after the trial or hearing and found that new evidence is an important matter in the assessment of damages.

[27] In the case of *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949, the House of Lords admitted evidence of matters that occurred after the trial but before hearing of the appeal at the House of Lords and after the appeal in the Court of Appeal. In that case, the appellant then aged 54 was injured at work in 1965. He brought an action against his employers, the respondent. In 1967, 2½ years after the injury, he was awarded 750 pound by the court of the first instance. On appeal in 1968, the Court of Appeal increased the award. Throughout the period following his injury, the appellant had been employed by the respondent and both the trial judge and the Court of Appeal took into account this factor of the appellant's employment in assessing the damages. Shortly after the judgment of the Court of Appeal, the appellant was dismissed by the respondent on the ground that they had no suitable employment for him in his weakened condition and that he might represent a danger to his fellow employees. The employment injury awakened a previously a silent condition of the generative arthritis in the spine and prevented his continuing such heavy work as he had previously engaged on. The dismissal was entirely *bona fide*. The appellant appealed against the decision of the Court of Appeal and sought leave to adduce fresh evidence (ie, as to his dismissal).The parties agreed that in the event the House of Lords allowing the appeal, damages should be increased by an agreed amount. The House of Lords held that it had the discretionary power to admit fresh evidence or re open a matter on fresh evidence even after the time of appeal had expired if a particular of exigencies clearly outweigh the general undesirability of so doing.

[28] In *Mulholland v Mitchell* [1971] 1 All ER 307, the House of Lords gave leave to adduce fresh evidence on matters that occurred after the trial but before the hearing of the appeal. Here, the respondent had been awarded damages for injuries sustained as a result of a road accident. Damages were assessed on the basis, *inter alia,* that it would be possible for him to be looked after at home and, if that proved to imposed too much strain on his family, in an ordinary nursing home. He appealed to the Court of Appeal against the award of damages. While the appeal was pending an application was made on his behalf for leave to adduce fresh evidence on the ground that there had been a dramatic change of circumstances since the award had been made at the trial. The plaintiff's mental condition had subsequently and unexpectedly deteriorated to such an extent that he could no longer be looked after at home, that rather than an ordinary nursing home, he needed specialist care in a psychiatric home and as a result, the cost of nursing care over long period would be about double the original estimated at the trial. The defendant appealed from the

order of the Court of Appeal, giving the plaintiff leave to adduce fresh evidence. The House of Lords upheld the decision of the Court of Appeal which allowed the fresh evidence and said:

> the Court of Appeal had unfettered discretion to admit evidence of facts occurring after the trial but, since it was desirable, that there should be a finality in litigation and fresh evidence should not be accepted relating to a matter falling within a field or area of certainty taken into account by trail judge, the court should only exercise its discretion in exceptional case, as where for example, the basis on which the trial judge gave, his decision had been clearly falsified by subsequent events. Since the basis on which the damages had been suddenly and materially falsified by a dramatic change in circumstances after the trial, the present case was exceptional and the Court of Appeal had rightly exercise its discretion in favour of admitting the fresh evidence

[29] In *McCann v Sheppard* [1973] 2 All ER 881, the plaintiff aged 24 were severely injured in a motor accident. In June 1972, he was awarded 37,548 damages by the court of first instance of which 20,000 was for pain and suffering, loss of amenities and risks the loss of expectation of life. His injuries were at his lower part of body and leg. He had a broken pelvis and much damage was done to his bladder and other internal organs. His urinary and sexual organs were impaired; He had to walk with a stick. In consequence of his injury, he was in a great pain; his doctor prescribed a pain killing drug on which he became more and more dependent; he was unable to work after the accident. In January 1970, he issued a writ against the defendant claiming damages for negligence. In June 1970, he married and in September 1971, his wife gave birth to a child. In the appeal, the defendant sought to adduce evidence that the plaintiff had died. The Court of Appeal held that:

> although the general rule in accident cases was that the sum of damages fell to be assess once and for all at the date of hearing, where the notice of appeal had been entered in due time, the Court of Appeal would be prepared to admit evidence of an event which occurred while the appeal was pending and which had falsified the basis on which the assessment had been made.

Accordingly the evidence that the plaintiff had died on 22 October should be admitted and the damages assessed accordingly.

[30] This court finds that the reason advanced on behalf of the plaintiff that the further evidence sought to be introduced at the appeal has a direct link or relevance to the evidence recorded in the trial is not a sufficient ground by itself to admit further evidence unless the plaintiff is able to satisfy the threshold test. This evidence was always available to be introduced at the trial if only proper and diligent steps were taken on behalf of the plaintiff by the various procedural steps provided in the rules of the court but it was not done. Further, there is nothing whatsoever which has been said as to why no such steps were taken to produce the evidence at the trial or even to amend the pleadings. There must be sufficient materials and satisfactory reason advanced in support of the application to adduce further evidence which had necessitated the filing of this application in order for this court to exercise its discretion in favour of the applicant. The discretion which this court is asked to exercise must be based on sound principles and cannot be arbitrarily exercised. The discretion, though wide must be exercised judiciously in accordance to rules of

reason and justice, not according to private opinion (see *Sharp v Wakefield* [1891] 1 KB 587) or sympathy (see *Bevington v Perks* [1925] 2 KB 231) and must be justifiable (see *Ritter v Godfrey* [1920] 2 KB 47) and the scale of justice must be held clear and even. If this discretion is too readily exercised, it would give; apparently an unsuccessful party an opportunity to renew the contest on an entirely different set of evidence or a case which ought to have been pleaded but was not pleaded for reason best known only to the plaintiff or their legal advisor at that time. The rule that the court ought not to dictate to parties how they should frame their case or pleadings is one that should always to be preserved sacred and cannot be gainsaid. The exercise of discretion must therefore be reasonable, fair and just.

[31] In *Teo Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd* [1996] 2 MLJ 596, the defendant's moved the Court of Appeal to adduce further evidence at the commencement of the appeal on the issue of the capacity in which the defendant had been sued. The statement of claim alleged that the defendants were trading as a firm at the time when the action was commenced but there was no plea that the defendants were partners at all material times. In fact, they have been sued in their individual capacity. The proposed evidence to be adduced at the appeal was to show that the defendant were not partner in the alleged liability accrued. In refusing leave to adduce further evidence, his Lordship Gopal Sri Ram JCA (delivering the judgment of the court) said at pp 600–601:

> At the commencement of the appeal, the defendants moved this court for leave to adduce further evidence on the issue of the capacity in which the defendants had been sued. This is the way which counsel put it. The statement of claim alleged that the defendants were trading as a firm. That may have been true when the action was commenced. But there was no plea that the defendants were partners at all material times. In truth they had been sued in their individual capacity. It was now proposed to adduce evidence to show that the defendants were not partners when the alleged liability accrued. So much for the argument.
>
> We refused leave to adduce further evidence on two main grounds. First, nowhere in their defence did the defendants plead the fact that they were merely partners of the firm at the date of the action but not when the liability accrued. Had they done so, it would have become necessary for the trial Judge to determine that issue. But nothing of the sort was ever done. The issue was one which never arose for determination. The fresh evidence was therefore being sought to be put in on a matter that had not arisen in the Court below. It was therefore entirely irrelevant, and, for that reason, inadmissible.
>
> Second, Counsel for the defendants before us frankly conceded that the evidence in question was available at the trial. Yet it was not put in. It follows therefore that one of the vital conditions upon which is dependent the exercise of discretion by an appellate Court to permit fresh evidence was absent (see *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70). The evidence, even if relevant (which is not the case), was not, on the basis of the exercise of discretionary power, admissible.

[32] This court is of the view that where there are no sufficient materials before this court and the 'threshold' test for adducing further evidence have not been established, this court cannot exercise its discretion in favour of the plaintiff and deprive a successful litigant of the decision which was given in his favour based on the evidence adduced at the trial. A party must state his case at the trial to ensure that his adversary

is not taken by surprise. Pleadings therefore uphold the rights to a fair trial. In *Commodore Pty Ltd v Perpetual Trustee* [1984] 1 NZLR 324 the court held that the object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion, while Odgers on *High Court Pleading & Practice* states that the function of pleadings then:

> is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision.

[33] It is a well established principle of law that a case must be decided on issues raised by the pleadings which binds the parties. A party is bound by his pleadings and his case is confined to the issues raised on the pleadings. The court is not entitled to decide a suit or matter on which no issue has been raised by the parties. Buttrose J stated the principle very clearly in *Seven Seas Supply Co v Rajoo* [1966] 1 MLJ 71:

> In other words it was submitted that the learned trial Judge had decided the case on issues not raised by the pleadings. It is a well established principle of law that a case must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment. If authority is needed see *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 LNS 65. In considering this question the pleadings must of course be taken as a whole.

[34] In *Hadmor Productions v Hamilton* [1983] 1 AC 191, Lord Diplock said:

> Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is …

[35] In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, Sharma J said:

> It is on the examination of the pleadings that the Court notices the differences which exist between the contentions of the parties to the action. In the words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The Court is not entitled to decide a "suit on a matter on which no issue has been raised by the parties. It is not the duty of the Court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the Court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the Court to come to a find into, different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.
>
> It was not open to the learned Magistrate to fly off at a tangent as it were and disregard the pleadings in order to reach a conclusion that he might have thought was just and proper. It was held by Scrutton LJ in the case of *Blay v Pollard & Morris* [1930] 1 KB 628 at p 634:

Cases must be decided on the issues on record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings and in my opinion he was not entitled to take such a course.

[36] Pleading plays an essential part in civil actions. They help to define the issues between the parties, and in doing so enable the court to adjudicate the action within the four corners of the pleadings. In *Farrell v Secretary of State for Defence* [1980] WLR 172, p 180, Lord Edmund Davies said:

It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as "a mere pleading point" is therefore bad law and bad practice. For the primary purpose of pleadings remains and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

[37] In *Haji Mohamed Dom v Sakiman* [1956] MLJ 45, the High Court of Ipoh held that:

Nowhere in the pleadings it is alleged that the agreement was in the nature of a document of loan, and the case never proceeded on that basis. In my view, once he had found that the agreement for sale was a genuine document, the learned trial Judge had no alternative but to order specific performance of the agreement or to award damages. I think it is clear that a Judge is bound to decide a case on the issues on the record and that if there are other questions they must be placed on the record, which in this case they were not, *Blay v Pollard & Morris* [1930] 1 KB 628 (at p 634).

[38] The basic principles as regards amendments to pleadings was stated by Brett MR in *Clarapede v Commercial Union Association* (1883) 32 WLR 262:

However negligent or careless may have been the first omission, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

[39] In *Tajul Ariffin v Heng Cheng Hong* [1993] 1 AMR 26 at p 1131, Edgar Joseph Jr J (as he then was) said:

Under the adversary system, the court has neither the power nor the duty to determine what are the issues or questions in dispute between the parties; save as may appear from the pleadings or other statements of the parties, the court has no investigative process of its own. The parties enjoy complete freedom by their pleadings or other requisite statements to delimit the issues or questions of fact or law, which they desire the court to determine and the court is bound to confine itself to only those issues or questions and no others.

There are, of course, exceptions for instance, 'it is the duty of the court when asked to give a judgment which is contrary to a statute to take the point, although litigants may not take

it' — per Scrutton LJ in *Phillips v Copping* [1935] 1 KB 21 applied by Thomson J (as he then was) in *Hee Cheng v Krishnan* [1955] 1 LNS 30. Similarly, it is under a duty to take notice of illegality (*Snell v Unit Finance Ltd*. [1964] 2 QB 203) or statutory invalidity (*Luckett v Wood* (gaming debt) [1908] 24 TLR 617) and the court is also under a duty of its own motion to rule as inadmissible any document or evidence which is protected from disclosure on the ground of Crown Privillege. [See *Duncan v Cammell & Co*. [1942] AC 624] as watered down by *Conway v Rimmer* [1968] AC 910].

[40] In *Clarapede v Commercial Union Association* (1883) 32 WLR 262, Brett MR said:

> However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

[41] In *Novotel Societe d' Investissements et d' Exploitation Hoteliers and Anor v Pernas Hotel Chain (Selangor) Bhd* [1987] 1 MLJ 210 Mohamed Azmi SCJ (as he then was) at pp 213–214 said:

> Novotel are bound by their pleading, affidavit evidence and as well as by their own financial accounts rendered to the defendants under the agreement. The importance of pleadings is already well established and if authorities are required we need only to refer to *Esso Petroleum Company Ltd v Southport Corporation* [1955] 3 All ER 864.

[42] In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; , Gunn Chit Tuan SCJ (as he then was) said at p 155:

> In his reply Mr Subramaniam pointed out that in his statement of defence the defendant never pleaded that wrong shares were delivered. He also referred to his submission in the court below when he had pointed out that Central Securities (Holdings) Berhad was the former name of Ganda Holdings Berhad.We would point out that this court has recently once again stressed the importance of pleadings in *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 in which Mohd. Azmi, SCJ stated at p 418 that:
>
> > Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at p 233

[43] In *Bruce v Odham Press Ltd* [1936] 1 KB 697, Scott LJ said:

> The word material means necessary for the purpose of formulating a complete cause of action, and if any one material fact is omitted, the statement of claim is bad.

[44] It would cause grave injustice to an adversary in our adversarial system to readily allow further evidence at the appeal stage by introduction of document or documents which was available even before the commencement of the trial and before the filing of the action by the plaintiff but the plaintiff did not take any reasonable steps to adduce the evidence at the trial and where this proposed evidence was not part of the plaintiff's pleaded case or even put to the defendant or his

witnesses at the trial (see *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 and *Teoh Hock Guan & Anor (t/a Teo Meng Huah Construction) v Johore Builders & Investments Sdn Bhd* [1996] 2 MLJ 596 at p 192)).

[45] Had the alleged liability pursuant to the charge documents been pleaded by an amendment to avoid any criticism of the evidence having departed from the pleaded case of the plaintiff or at least raised during cross examination, perhaps this court in carrying out the balancing exercise may tilt the scale in favour of the plaintiff provided it does not entail injustice to the other side or prejudice the right of the defendant in his defence to oppose the pleaded case of the plaintiff. In fact, the plaintiff is not even a party to the proposed charge documents as stated aforesaid. The plaintiff has failed to give any satisfactory or reasonable explanation in his affidavit as to why the charge documents were not introduced during the trial or put to the defence's witnesses apart from shifting the blame to the defendant that the charge documents were in the possession of the defendant and the defendant ought to have produced same. In the instant case, the plaintiff seems to shift the blame on everybody else except themselves and their previous advisors.

[46] This is also not a case of procedural technicalities strewn in its path but a clear case of not pleading the plaintiff's case where the material sought to be introduced presently at this appeal was available during the trial. One thing must be made clear that this application to introduce further evidence at the appeal stage is not based upon a ground of procedural breach or on technicalities at the trial but is based upon substantive evidence as claimed by the plaintiff which have been obviously omitted to be presented at the trial for which the plaintiff must accept the fate. All the cases reported on procedural technicalities to oppose have to be distinguished when compared to the factual matrix in the instant case. The exercise of discretion whether to grant or not, however should not be overstretched and to a ridiculous edge of opportunity just to suit the wishes of one party.

[47] Clause 12 of the charge documents (exh CWL-1) attached to the affidavit in support (encl 12) which the plaintiff's solicitors are relying expressly states, inter alia that in default whereof it shall be lawful but not obligatory upon the chargee-bank-defendant to pay the quit rent assessment rates taxes and all other outgoings whatsoever payable from time to time in respect of the said land as and when the same shall become due and payable which must necessarily refer to the period during the existence of the charge. On the other hand, cl 24 which is also relied on merely states that all costs charges and expenses incurred hereunder by the Bank including hereunder by the chargee-bank-defendant paid by the chargee or pursuant to the provision of the NLC shall on demand be paid to the bank by the chargor. So nowhere it is stated in cll 12 or 24 that the chargee must first settled the arrears of quit rent and the claim the same from the chargor as contended by learned counsel for the plaintiff in the written submission at p 6 under the heading of 'specific obligation of the chargee'

[48] Clause 12 states as follows:

The chargors(s) will at all times during the continuance of this security pay the quit rent assessment rates taxes and all other outgoings whatsoever payable from time to time in respect of the Said Land as and when the same shall become due and payable. In default whereof it shall be lawful but not obligatory upon the Bank to pay the same or any part thereof.

[49] Clause 24 states as follows:

All costs charges and expenses incurred hereunder by the Bank including any expenditure incurred in the creation enforcement or preparation of this charge or in the giving of any notice or in the making of any demand under pursuant to or in respect of this charge or any moneys secured by this charge and all other moneys whatsoever paid by the Bank in respect of the said costs charges expenses and expenditure or otherwise howsoever and all or any sums of money paid or expended by the Bank under or pursuant to the provisions of the National land Code and this charge express or implied and in particular the provisions of cll 12,13,14,17,19 and 21 aforesaid shall bear interest thereon at the Prescribed Rate with monthly rests from the date of the sums having been paid or expended and such sums and interests shall on demand be paid to the bank by the chargor(s) and until payment shall be charged on the Said land in addition to the principal sum hereby advanced and shall form part of the first payment due under this charge.

[49] Therefore, it is not the correct proposition in law or on the facts to submit that it is the obligation of the chargee to settle the arrears of quit rent as contended on behalf of the plaintiff. The express provision of cll 12 and 24 of the annexure to the charge is crystal clear and imposes the obligation and liability on the chargor and not on the chargee-bank-defendant.

[50] This court also finds that the statement of claim of the plaintiff has alleged that *pursuant to the terms of the sale*, the defendants were liable to pay the arrears of quit rent for the years 1982 to 1984. However, by summons in chamber (encl 11), the plaintiff has now applied to adduce further evidence *to rely on the terms of the charge documents* particularly cll 12 and 24 to show that the defendant as the chargee-bank are liable to pay the arrears of quit rent for the years 1982–1984. It is therefore clear by the statement of claim that the plaintiff's claim is based on the condition of the sale (exh CWL-6) whereas by the proposed further evidence to be adduce at this appeal, the plaintiff is attempting to rely on another sets of documents being the terms of the charge documents which is now termed as further evidence and not fresh evidence which was not even pleaded or raised or put to the defendant's witness at the trial. In fact this court wish to reiterate that cll 12 and 24 of the annexure attached to the charge does not assist the plaintiff as it expressly states that the chargor is responsible during the continuance of the charge to pay the quit rent assessment rates taxes and all other outgoings whatsoever payable from time to time in respect of the said land. Nowhere it is stated in cl 12 that the chargee shall settle the arrears of the quit rent and claim from the chargor. Accordingly, the further evidence which is sought to be introduce is unlikely to have had or would have been likely to have had a determining influence upon the decision of the learned Sessions Court judge.

[51] Litigants or their legal advisors should not be encouraged to omit or neglect to place before the trial court all the evidence that is material and readily available at the time of the trial in the expectation or hope that their omission or neglect or even delay will be condoned and their demands considered at the appeal by attempting to introduce further evidence at the appeal stage so as to interfere or frustrate the decision of the lower court which was given in favour of its adversary. The obligation on a plaintiff or a litigant to advance his whole case at trial is fundamental and requires no reminder. However in exceptional cases and subject to the plaintiff satisfying the 'threshold' test and if it would be in the interest of justice to admit and give effect to further evidence at the appeal stage, the court is given the discretion to admit such further or fresh evidence. The principles in favour of one trial and against the changing tactics and the scepticism directed towards tactical decisions remained of paramount and fundamental importance in our judicial system. However, the floodgates were not to be open on exceptional facts of the case and subject to the plaintiff satisfying the 'threshold' test and that it was necessary or expedient in the interests of justice to receive the proposed further evidence. Each case is turned on its own set of facts and circumstances and whether by applying to introduce further evidence at the appeal stage which evidence was readily available at all times and at trial is seeking a second bite at the cherry is also a factor to be considered.

[52] In the instant case, there is also nothing for the defendant to reply unless the plaintiff has been successful or been able to satisfy the threshold test which the plaintiff had failed to do so for the reasons as stated above. The discretion, however demanding is for one party should be exercised with care and caution and granted sparingly and judiciously with regard to all circumstances of the case and the prejudice to be caused to the adversary. This court must make it clear that the contest to this application to introduce further evidence at this appeal stage is not technical in nature but goes to the root of finality in litigation. Otherwise, that would to some extent encourage litigants to prolong the case and attempt to have a second bite and place the blame on his previous solicitors every time a decision is given against him and then attempt to seeks the court's indulgence to enable him or her to introduce another sets of evidence at the appeal stage by seeking the court's indulgence to introduce further evidence thereby abusing the process of the court. In *Lo Fat Thjan & Ors v Public Prosecutor* [1968] 1 MLJ 274, Syed Agil Barakbah LP at p 277 said:

> we would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing *lacunae* in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial.

[53] This is a clear case of a frustrated litigant who had failed or neglected to present his case adequately in order to meet his claim against the defendant where he had slept on his rights and opportunity and who has now woke up from his sleep with the view to seek the court's indulgence to give him a second chance (see *David Wong Hon Leong v Norazman bin Adnan* [1995] 4 CLJ 155 at p 162). It has been said time and time again that the court assists the vigilant and not an indolent litigant (see *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 at p 229). There is of course no hard and fast rule on the exercise of the court's discretion and every case must obviously depend upon its own circumstances. Where the plaintiff

had slept upon his right for a great length of time which is known as 'negligent inactivity', the balance of justice must also consider finality and certainty and the court cannot sacrifice finality which is expected practice when considering whether the discretion should be exercised in favour of granting or withholding it. This court is mindful that the duty of finality should not and cannot be the sole consideration but however it is a factor which ought to be considered in the balancing exercise as in the instant case. For this court to lend its hand in aid to the plaintiff would be at the expense of the defendant who is not found in anyway at fault. The plaintiff should not be allowed to wake up after a long period to seek the court's indulgence to rectify an apparent omission due to his carelessness or neglect where the evidence sought to be introduced was easily available and obtainable very much before the pleading were drafted against the defendant or before the trial had started and during the trial and at the close of the case at the lower court. Justice which is sought to be applied to the plaintiff must equally apply to its adversary. 'What is good for the goose is also good for the gender'.

[54] This court also finds that the plaintiff has failed to satisfy this court the threshold test as provided in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445 where His Lordship Gopal Sri Ram JCA (delivering judgment of the court) said at p 452:.

> With respect, I am unable to accept the reasoning of the learned judge in the foregoing passage. In my judgment, the criteria for permitting a party at a trial to reopen its case for the purpose of either recalling a witness or calling fresh evidence are very different from those that govern the statutory jurisdiction of an appellate court to receive further evidence. Indeed they cannot be the same as I shall try to demonstrate. In the first place, although an appeal is, as observed by the learned judge in *Yah bte Aji*, by way of rehearing, there are important constraints on an appellate court. See, *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41, at p 42. Such constraints include the deference given by an appellate court to the audio-visual advantage enjoyed by the trial court. These constraints are absent at a trial. The trier of fact is yet to see and hear the witness whose evidence it is sought to be adduced by a re-opening of the case. In the second place, the issue on an application to adduce further evidence before an appellate court is whether the party seeking to adduce it could not by reasonable diligence have obtained it for use at the trial. This does not enter at all into the equation before the trial court. In the third place, an application to adduce further evidence before an appellate court is temporally fixed. That is to say, it is fixed at the point when all the evidence is in and the submissions are over and more importantly, the trial judge has pronounced his views on the evidence before him. What an applicant for further evidence at the appellate stage seeks to do is to persuade the court hearing the appeal that if the trial judge had had the further evidence before him, he may, or even would, have come to a different conclusion. But that is not the position at the trial. For temporally speaking, whether the trial judge may exercise his discretion to permit the reopening of a party's case will very much depend on the stage at which the application is made. It may be more likely that discretion may be exercised at the stage where the application is made immediately after a party closes his case. But it may be less likely that discretion will be favourably exercised where the application is made after the defendants have closed their case and just before the trial judge is about to pronounce his judgment. In the spectrum of factual possibilities that exist between each of these two extremes the exercise of discretion would, in my judgment, very much depend as to where the justice of the case lies having regard to the peculiar facts and circumstances before the court.

[55] In fact this court wish to reiterate that there is not even a shred of evidence as to why the charge documents were not introduced at the trial by various methods that were available to be invoked to produce and procure the same at the trial. This court also finds that this is not the type of evidence which had surfaced or discovered just during the interval between the decision of the lower court and the date of hearing of this appeal. It is the evidence which was readily available at all times before, during the trial and after the close of the plaintiff's case or even the defendant's case. If only proper care and due diligence were taken it could have been produced at the trial by the various procedures as provided in the rules of the court. This method of attempting to introduce further evidence at this stage certainly would go against the finality in litigation and in the public interest as that there should be an end to litigation. Rules of court are devised to ensure the expeditious dispatch of litigation. In the instant case, there is a real risk of prejudice to the defendant for which compensation by way of an award of costs is not sufficient redress. To exercise discretion by the court, its powers must be exercise judiciously and not with the view to favour one side. Powers of the court must be dictated by the exigency of the circumstances of the case and fairplay and good sense appears to be the only safeguard. The importance of finality in litigation cannot be gainsaid unless the injustice that would be perpetrated if the proposed further evidence which is not allowed is so grave as to overbear the pressing claims and finality in litigation. On the facts in the instant case, if the application is granted, or encouraged, it will destroy the fabric of the principles that there should be finality in litigation.

[56] Justice means according to law. The court must consider settled principles in so far as the application in the instant case, the appellant must satisfy the threshold test as in *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445. Judicial power should never be exercised for the purpose of giving effect to the will of a judge; 'Always for the purpose of giving effect to the will of the legislature; in other words, to the will of the law' (see *Osborne v Bank of USA* 9 Weather 738 at p 866). This court therefore finds that the plaintiff cannot default the learned sessions court judge for not taking into account the piece of evidence which is now proposed where the plaintiff did not place or had applied to introduce before the sessions court due to his neglect or omission. Consequently, the plaintiff has failed to satisfy the first requirement of the threshold test being that the further evidence was not available to the plaintiff at the trial who now intends to use it or that reasonable diligence would not have made it so available or obtainable.

[57] As to the second contention that the further evidence would have had or would have been likely to have had a determining influence upon the decision of the trial court is also without any basis as cll 12 and 24 which the plaintiff is relying to persuade this court to introduce the further evidence at this stage expressly states that it is the obligation of the charger to pay the quit rent and not the charge. Therefore, the plaintiff has also failed to satisfy the second requirement of the threshold test. The discretion to allow to introduce further evidence can only be properly invoked where it is demonstrated that the integrity of the earlier litigation process at the trial has been undermined. It is therefore not sufficient to show merely that the earlier process at the sessions court produced a wrong decision.

[58] As to the inherent power provided under O 92 r 4 of the RHC, which is relied on by learned counsel for the plaintiff, it is to be invoked to prevent injustice or to prevent an abuse of the process of the court. In the instant case, first, there is no injustice to the plaintiff as the plaintiff was represented by an advocate and solicitor at the trial and had all the opportunity to adduce the evidence, and secondly, there is no abuse of the process of the court by the defendant where this application is opposed. On the contrary, it is the plaintiff who is taking undue advantage to introduce further evidence at the appeal which tantamount to an abuse of the process of the court when considering the facts, circumstances and background in the instant case. Therefore, the procedural rules as provided under O 92 r 4 of the RHC does not apply on the facts and circumstances in the instant case and ought not to be invoked. The application of the inherent jurisdiction in the cases which had been referred to in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Sdn Bhd* [2004] 1 MLJ 271 were cases where the objections were taken on technicalities, procedural defects and non compliance of the rules and not as per the facts and circumstances as in the instant case.

[59] In the circumstances and on the facts in the instant case, this court is of the respectful view that this is not a fit and proper case for the court to exercise its discretion in favour of granting the application which is opposed by the defendant. This court has refused leave to adduce further evidence as proposed in this application on the grounds; first, nowhere in the statement of claim did the plaintiff plead the fact or had relied on the charge documents or the terms of the charge, secondly, neither did the plaintiff put or refer to the charge documents to the defendant or the witnesses during cross examination at the trial; thirdly, neither was any application made for amendment to introduce this piece of evidence be it even after the close of the plaintiff's case or during the defendant's case; fourthly, no attempt or application was made to reopen the plaintiff's case in the lower court to introduce the charge documents and fifthly, the further evidence if adduced would not have had or would have been likely to have had a determining influence upon the decision of the learned Sessions Court judge (see *In Re Chennell Jones v Chennel*l and *Tan Kah Khiam v Liew Chin Chuan*).

[60] On the totality of the facts and circumstances in the instant case, justice clearly demands that the application should be disallowed. Although there is no affidavit in reply filed on behalf of the defendant, it is still necessary for the plaintiff to satisfy this court the two threshold tests as stated above which the plaintiff has failed to do so. Accordingly, for the reasons set out earlier, this court finds that this is not a proper case to exercise the court's discretion in favour of the plaintiff in respect of the application (encl 11).

[61] In accordance with reasons and justice, and on the facts and circumstances in the instant case, the application (encl 11) is dismissed with costs.

Application dismissed with costs.

Reported by Sally Kee